

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ANDRES VALENCIA
Claimant

VS.

CAPITAL CITY PALLET
Respondent

AND

FREMONT COMPENSATION INSURANCE GROUP
Insurance Carrier

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Docket No. 236,556

ORDER

Respondent appeals from a preliminary hearing Order entered by Administrative Law Judge Brad E. Avery on October 15, 1998.

ISSUES

The ALJ found that claimant suffered accidental injury arising out of and in the course of his employment and ordered an independent medical examination to be performed by Dr. Sergio Delgado to determine the need for further medical treatment. The Order denied claimant's request for temporary total disability compensation. On appeal, respondent requests review of the decision that claimant sustained personal injury by accident and arising out of and in the course of his employment with respondent. The respondent also contends that the ALJ committed error by granting an objection to testimony by a proposed witness, by granting the objection to the introduction of a surveillance video, and in ordering an independent medical examination.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes that the Order by the ALJ should be affirmed.

The Appeals Board has limited jurisdiction in appeals from preliminary hearing orders. The Board may review only contentions that the ALJ has exceeded his or her jurisdiction. Whether claimant sustained a personal injury by accident and whether that

accident arose out of and in the course of his employment, both issues raised in this appeal, are designated, by statute, as jurisdictional issues. K.S.A. 44-534a.

The Board first concludes that based upon the evidence produced at the hearing, the conclusion that claimant suffered accidental injury and that that injury arose out of and in the course of his employment should be affirmed. Claimant testified that he was injured on July 23, 1998, when a fork lift pushed a pallet of wood into claimant, injuring various parts of his body from his shoulders down through his back, knees, and feet. Claimant reported the incident and was sent for treatment with Dr. Doug Frye who concluded that he cannot explain the whole body problems from a single injury and does not find any area that has been specifically injured. Dr. Frye referred claimant to a personal physician at the Marion Clinic.

Claimant was also examined, at the request of claimant's counsel, by Dr. Sharon L. McKinney, a specialist in physical medicine and rehabilitation, and by Dr. Enrique Morales, a psychiatrist. Dr. McKinney concluded claimant suffers from myoligamentous strains to the quadratus lumborum and left knee. Dr. Morales' report includes the history of the injury on July 23, 1998, and concludes a diagnostic impression that claimant is suffering from consequences of the traumatic experience that threatened not only his physical existence but also his emotional and social capacities to cope.

Respondent has challenged the claim in part by disputing claimant's credibility. Respondent suggests that the description of injury is inherently improbable. Respondent also points out that claimant was working illegally in the United States but has presented a social security number. Finally, respondent presents the testimony of a coworker who claims that claimant was not struck at the time of the alleged incident.

Respondent's evidence does, in fact, seriously challenge the version presented by claimant. The Board is, nevertheless, persuaded to affirm the conclusion by the ALJ. The Board is so persuaded by several factors. First, the Board generally gives deference to the ALJ in his evaluation of credibility for witnesses observed by the ALJ. In this case, both claimant and the coworker testified before the ALJ. Second, the Board is persuaded, in part, by the report by Dr. McKinney. That report indicates myoligamentous strains in various parts of the body consistent with claimant's description of accident. Finally, the report from Dr. Morales is consistent with claimant's version of events.

The above conclusions are based upon the evidence presented. Respondent contends the ALJ improperly excluded other evidence which might support a different conclusion. The Board has, on several occasions, held that decisions on admissibility of evidence are not jurisdictional issues. *Deleon v. Boone Brothers Roofing*, Docket No. 228,525 (July 1998); *Ogdon v. Evcon Industries Inc.*, Docket No. 230,945 (June 1998). The undersigned would review such ruling only to the extent and under circumstances where an error in the evidentiary rule might have produced an error in a jurisdictional finding or an error which caused the ALJ to exceed his or her jurisdiction. The record presented does

not establish the rulings in this case led to a decision which exceeds the jurisdiction of the ALJ.

The ALJ excluded a videotape offered after hearing testimony that the videotape was made from 8-millimeter film and that not all of the film was transferred onto the videotape. The witness testifying did not know how it was determined what had been transferred to the videotape. The stated objection was on the basis of chain of custody. While this might not have been a properly stated objection, the Board cannot conclude that the ALJ improperly excluded evidence which led to a ruling which exceeded his jurisdiction. Respondent's counsel did not before the ALJ and does not now, except in a very general way, make any proffer of what the videotape might show. The Board can not say the tape might change the ruling on a jurisdictional issue.

The ALJ also sustained claimant's objection to the testimony by one additional witness, Linda Inman. The Judge had ordered the witnesses sequestered. This individual had, however, been present at the hearing and heard testimony of the other witnesses. The Board does not believe the ALJ exceeded his jurisdiction by doing so. In addition, the only proffer regarding the testimony relates to a very general statement that if by this witness it would indicate claimant did not leave work because of the injury and that claimant did not suffer the injury as stated. From this general proffer, the Board cannot conclude that the ALJ exceeded his jurisdiction by finding that claimant sustained accidental injury arising out of and in the course of his employment.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order entered by Administrative Law Judge Brad E. Avery on October 15, 1998, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of December 1998.

BOARD MEMBER

c: Beth Regier Foerster, Topeka, KS
Gary R. Terrill, Overland Park, KS
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director